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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12 WESTERN DIVISION
13

14 UNITED STATES OF AMERICA,
15 Plaintiff,
16 v.
17 TREVOR JAMES KIRK,
18 Defendant.

Case No. 2:24-00527-SVW

GOVERNMENT'S POSITION STATEMENT IN
RESPONSE TO PRE-SENTENCE REPORT
RE. DEFENDANT TREVOR JAMES KIRK

[Fed. R. Crim. P. 32(f)(1)]

DATE: May 19, 2025
TIME: 11:00 a.m.
PLACE: FSCH, Courtroom 10-A
EST: 20 minutes
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INTRODUCTION

On September 4, 2024, a grand jury indicted defendant TREVOR JAMES KIRK for a violation of 18 U.S.C. § 242 (Willful Deprivation of Rights Under Color of Law). Specifically, the indictment alleged that, on June 24, 2023, defendant, then acting as a Deputy with the L.A. County Sheriff's Department ("LASD"), used unreasonable and unnecessary force to detain and secure victim J.H.'s person while attempting to conduct an investigatory detention of "J.H." and her associate "D.B." for a reported robbery at a grocery store in Lancaster, CA, which thereby deprived J.H. of the right, as stated in the Fourth Amendment, "to be secure in [her] person[] ... against unreasonable ... seizure" of her person. (CR 1 at 2, 5.)¹ The indictment also alleged felony enhancements that, during his commission of the offense, defendant used a "dangerous weapon" (i.e., pepper spray) and caused J.H. to sustain "bodily injury."

On February 6, 2025, after a two-day trial, a jury found defendant guilty of Deprivation of Rights Under Color of Law, in violation of 18 U.S.C. § 242. (CR 51 at 2.) In its verdict, the jury also made an ambiguous special finding that "J.H. suffered bodily injury as a result of [defendant]'s acts" or "the defendant[]" acts included the use of a dangerous weapon." (Id.)²

¹ "CR" refers to the Clerk's Record (a/k/a the docket sheet) and is followed by the docket number for the subject document.

² The verdict form was prepared and filed by the Government on January 20, 2025, with defendant's assent. (CR 29.) After belatedly perceiving the form's ambiguity, the Government filed a revised proposed verdict form on the morning of February 6, 2025, shortly before closing arguments were to commence. (CR 44.) Defendant objected to the revised form, and the Court declined to use it. (See CR 60 at 5-7.)

1 In mid-April, the parties filed a stipulation to continue the
2 sentencing to permit the Government additional time to review the
3 facts and proceedings in this case.³ The Court denied the proposed
4 continuance. In this brief, the Government objects to the PSR's
5 Guideline calculations and states its sentencing recommendation.

6 **POST-TRIAL AGREEMENT RE. PLEA & SENTENCING**

7 On May 1, 2025, the parties filed a "Post-Trial Agreement Re.
8 Plea and Sentencing." (CR 82.) In that agreement, defendant agrees
9 to plead guilty to a misdemeanor violation of 18 U.S.C. § 242, which
10 is a lesser-included offense of the count charged in the indictment.
11 (CR 82 at 2-3.) Defendant also agrees to admit under oath, and for
12 the first time, that he "used unnecessary force" while attempting to
13 detain J.H. on June 24, 2023 and that he did so "willfully." (Id. at
14 9.) Moreover, provided that the Court accepts the agreement,
15 defendant has agreed to waive his right to appeal the misdemeanor
16 conviction and the stipulated sentence and also waive his right to
17

18 ³ Post-trial review and reconsideration of litigative positions
19 in a given case, or a group of cases, is not new. In December 2022,
20 for example, the Department issued a memorandum that established a
21 new set of policies regarding charging, pleas, and sentencing and, to
22 ensure compliance with it, directed prosecutors to review all pending
23 cases "in which a final judgment after sentencing [had] not been
24 imposed" and to "take steps to render the charging document, any plea
25 agreement, and the sentence consistent with these policies." See
26 Garland Memo, at 6 (Dec. 16, 2022). That directive applied even "if
27 a defendant has already been convicted at trial" and, in appropriate
28 cases, required the dismissal or striking of statutory sentencing
enhancements. In March 2023, the USAO created a Conviction Integrity
Committee that would "continually review our work as prosecutors and
will buttress all of the policies and procedures designed to prevent
wrongful convictions." And, long before any of those policies were
issued, line prosecutors were allowed (with supervisory approval) to
dismiss or strike statutory enhancements after trial to ensure
substantial justice. See, e.g., United States v. Juan Zazueta, Case
No. SA CR 04-251-AHS (Jan. 19, 2007) (post-trial agreement in which
USAO agreed to strike § 851 Information to avoid unwarranted
disparity in sentencing of defendant and co-defendants).

1 collaterally attack the conviction and sentence. (Id. at 1-2, 11-
2 12.)

3 These concessions by defendant are significant. As the Court
4 well knows, a verdict in any case — civil or criminal — is not the
5 end of the matter. Here, the defendant has the right to appeal the
6 conviction, including the fairness of the trial, rulings on
7 evidentiary issues, the validity of the jury instructions, the
8 sufficiency of the evidence, and any other claims of error that he
9 believes occurred during the proceedings in this case. He would also
10 have the right to appeal the sentence based on misapplication of the
11 Guidelines and the reasonableness of the sentence, and, for the
12 reasons noted below, he would have the Government's support on both
13 of those points. Even if the conviction were affirmed on direct
14 appeal, he would still have the right to pursue a collateral attack
15 under the habeas remedy codified in 28 U.S.C. § 2255. All of those
16 proceedings would tax judicial and prosecutorial resources, delay
17 resolution of the case, and deny the parties and the public a sense
18 of closure and finality.

19 Thus, in accordance with the Post-Trial Agreement and 18 U.S.C.
20 § 3553(a), the Government hereby recommends that the Court impose the
21 sentence that the parties have agreed upon, namely, the following:
22 (1) a mandatory special assessment of \$25; (2) a fine as determined
23 by the Court, but no greater than \$5,500; (3) restitution, if any, to
24 be determined by the Court; and (4) a one-year term of probation, on
25 the conditions specified in Paragraph 17 of the agreement, namely:
26 (a) defendant shall comply with the rules and regulations of the
27 United States Probation & Pretrial Services Office and Second Amended
28 General Order 20-04; (b) defendant shall not commit any violation of

1 local, state, or federal law or ordinance; (c) during the period of
2 probation, defendant shall pay any criminal debt in accordance with
3 the judgment's order pertaining to such payment; and (d) defendant
4 shall cooperate in the collection of a DNA sample from the defendant.
5 (See CR 82 at 10-11.)

6 For the misdemeanor offense to which defendant has agreed to
7 plead guilty, and in light of the Government's review of the evidence
8 and trial transcripts, the Government believes this sentence is
9 "sufficient, but not greater than necessary," to satisfy the
10 sentencing objectives set forth in 18 U.S.C. § 3553(a). Defendant
11 has no criminal history, and the nature and circumstances of the
12 offense, including J.H.'s injuries (which were limited in duration
13 and severity), do not call for a more severe sentence. A sentence of
14 the type suggested in the Pre-Sentence Report (i.e., 108-120 months'
15 imprisonment) is patently unjust on these facts; it is not even close
16 to reasonable. And, in a case that reminds police officers of the
17 need to avoid excess in the discharge of their duties, § 3553(a)'s
18 above-quoted language provides an important reminder to prosecutors
19 and courts alike of the need to avoid excess in sentencing.

20 It also bears noting that, prior to trial, the Government was
21 willing to enter into a plea agreement that would have allowed
22 defendant to plead to a misdemeanor violation of § 242.
23 Specifically, in an e-mail to defendant's attorneys, dated December
24 20, 2024, Government counsel advised as follows:

25 "After running your request up the chain
26 of command for a diversionary disposition
27 in this matter, we unfortunately are
28 unable to agree to a diversionary
disposition. However, we are authorized
to keep open our offer in principle to a
misdemeanor disposition[.]"

1 So, the Government's Post-Trial Agreement for a misdemeanor
2 disposition is not a sharp departure from the Government's prior
3 assessment of this case and how it should be resolved. Moreover, by
4 offering a post-trial misdemeanor disposition, the Government avoids
5 the appearance of imposing a so-called "trial tax" on defendant
6 simply because he exercised his right to trial.

7 **PARTIES' SENTENCING GUIDELINE CALCULATIONS**

8 In Paragraph 15 of the Post-Trial Agreement, the parties agreed
9 to the following Sentencing Guidelines factors:

10	<u>Base Offense Level:</u>	10	USSG § 2H1.1(a)(3)
11	<u>Offense Characteristics</u>		
12	Offense Under Color of Law:	+6	USSG § 2H1.1(b)(1)(B)
13	<u>Adjustments</u>		
14	Acceptance of Responsibility:	-3	USSG §§ 3E1.1(a), (b)
15	<hr/>		
16	Total Offense Level:	13	
17	Criminal History Category:	I	
18	Guideline Range:	12-18 months' imprisonment	
19	Fine:	\$5,500-\$55,000	

20
21 (CR 82 at 10.) The parties further "agree[d] not to argue that any
22 other specific offense characteristics, adjustments, or departures be
23 imposed." (Id.)

24 Provided defendant continues to accept responsibility for the
25 misdemeanor offense in accordance with the Agreement, the Government
26 hereby moves for a full three-level downward adjustment under USSG
27 § 3E1.1(b). Based on Booker and § 3553(a), the Government further
28

1 recommends the probationary sentence set forth above and in the
2 Agreement.

3 **USPO'S SENTENCING CALCULATIONS & RECOMMENDATION**

4 In the Revised Pre-Sentence Report ("PSR"), dated May 6, 2025,
5 the USPO states that defendant's Total Offense Level is 31. (PSR
6 ¶ 65.) Defendant has zero criminal history points, which puts him in
7 Criminal History Category I. (PSR ¶ 71.) Thus, the USPO concludes
8 that the Guidelines' advisory sentencing range is 108-120 months'
9 imprisonment, with the statutory maximum capping the high-end of the
10 Guideline range. (PSR ¶ 127.)

11 Based on the verdict, the PSR states that the statutory maximum
12 sentence for the offense of conviction is 10 years (or 120 months) of
13 imprisonment. (PSR ¶ 126.) The USPO recommends a term of 87-months.
14 (See USPO Ltr. at 1.)

15 **RESPONSE TO PRE-SENTENCE REPORT**

16 As noted above, the Government believes the Guideline sentencing
17 range, as calculated in the PSR, is "patently unjust" and "not even
18 close to reasonable." To be clear, though, that sentencing range is
19 due to misapplication of the Guidelines, which was urged erroneously
20 by the Government. We correct that error here.

21 **A. Objections to Offense Level Calculation**

22 The PSR's calculation of defendant's Total Offense Level is
23 incorrect because it erroneously imports the guideline for
24 "aggravated assaults" (USSG § 4A2.2) to determine the Base Offense
25 Level, which produced a Base Level of 23, instead of the correct Base
26 Level of 10. For that reason, the Government objects to PSR ¶¶ 42-53
27 in their entirety. The Government also objects to PSR ¶¶ 58-60 for
28 their misapplication of a two-level "obstruction of justice"

enhancement under USSG § 3C1.1. The Court should calculate the Guidelines range in accordance with the parties' Post-Trial Agreement.

B. The Correct Base Offense Level

Section 2H1.1 is the guideline applicable to Offenses Involving Individual Rights, including violations of 18 U.S.C. § 242, and it provides that the Base Offense Level is to be determined by "apply[ing] the greatest" of the following options: "(1) the offense level from the offense guideline applicable to any underlying offense; (2) 12, if the offense involved two or more participants; (3) 10, if the offense involved (A) the use or threat of force against a person, or (B) property damage or the threat of property damage; or (4) 6, otherwise." See USSG § 2H1.1(a). As to the first option, the Court must look to "the offense guideline applicable to any conduct established by the offense of conviction that constitutes an offense under federal, state, or local law." See § 2H1.1, Application Note 1.

In a memo to the USPO, the Government contended that the guideline most applicable to defendant's underlying offense conduct was § 2A2.2, which applies to "Aggravated Assaults." That guideline produces the "greatest" Base Offense Level (23), well above the 10-level base under § 2H1.1(a)(3). (PSR ¶¶ 42-53.)

The Guidelines define "aggravated assault" as follows:

"Aggravated assault" means a felonious assault that involved **(A) a dangerous weapon with intent to cause bodily injury (i.e., not merely to frighten) with that weapon; (B) serious bodily injury;** (C) strangling, suffocating, or attempting to strangle or suffocate; or (D) an intent to commit another felony.

1 Id. § 2A2.2, cmt. n.1. The USPO determined that defendant's conduct
2 qualified as an "aggravated assault" based on the first two grounds:
3 (a) it involved a "dangerous weapon" (i.e., pepper spray) "with
4 intent to cause bodily injury"; and (b) it involved "serious bodily
5 injury" to victim J.H. (PSR ¶ 50.)

6 First, regardless whether pepper spray qualifies as a "dangerous
7 weapon" (i.e., "an instrument capable of inflicting death or serious
8 bodily injury," per USSG § 1B1.1, comment. n.1(E)), the evidence in
9 this case does not show that defendant sprayed J.H. in the face "with
10 intent to cause bodily injury." After he forcibly threw J.H. to the
11 ground (see Ex. 45, at time-mark 2:18), defendant struggled with J.H.
12 for 28 seconds before deploying the pepper spray (see Ex. 45, from
13 2:21 to 2:49). During that time, he twice told J.H. to "get on the
14 ground" and told her to "Stop!" five times. (See Ex. "B" at 3.) On
15 two of those occasions, he supplemented his "Stop" command as
16 follows: (1) "Stop or you're going to get punched in the face"
17 (coupled with a physical display that he was preparing to do just
18 that, though he never did punch her); and (2) "Stop, turn around!"
19 (Id.)

20 While telling J.H. to "get on the ground," defendant used both
21 hands (left hand on the back of her neck and his right hand on the
22 right side of J.H.'s mid-back) to force J.H. to stay on the ground.
23 (See Ex. 45, at 2:23.) When defendant moved his right hand from
24 J.H.'s back to grab her right wrist (in an apparent effort to gain
25 control of it for the application of handcuffs), J.H. resisted those
26 efforts by moving her torso and head upward and to the right to face
27 and argue with defendant. (Ex. 45, at 2:24.) That prompted
28 defendant to once again use both hands (left on the back of her neck

1 and the right on the back or her right shoulder) to force J.H. back
2 to the ground and facing away from him while demanding that she
3 "Stop!" (Ex. 45, at 2:26.) When defendant moved his left hand to
4 grab J.H.'s right wrist, J.H. twisted again to her right and toward
5 defendant while gesturing with her left arm and hand. (Ex. 45, at
6 2:30.) After J.H. continues to resist and defendant advises dispatch
7 that he's in a "fight" (Ex. 45, at 2:41), defendant, while holding
8 J.H.'s right wrist in his left arm, uses his right hand to force her
9 to turn away from him again, while yelling "Stop!" (Ex. 45, at
10 2:43.)

11 After continued resistance by J.H., defendant made a decision to
12 use pepper spray (Ex. 45, at 2:46) and then used pepper spray on J.H.
13 in multiple bursts (Ex. 45, at 2:49-2:51), the first of which appears
14 to hit J.H. in the scalp area on the back and right side of her head
15 (Ex. 45, at 2:50) and a later burst more squarely in her face (Ex.
16 45, at 2:51).

17 With that, J.H. became more compliant, although she continued
18 with mild physical resistance (e.g., never rolling over, face down
19 and otherwise resisting handcuffing) and verbal protests about
20 defendant's conduct and demands that someone call the LASD "[Watch]
21 Commander." (See Ex. 45, at 2:45-3:37.) Defendant demanded of J.H.,
22 "Hands behind your back! Put your hands behind your back!" (Ex. 45,
23 at 2:57.) Defendant was then able to cuff J.H.'s right wrist. (Ex.
24 45, at 3:18.) Defendant then twice demanded that J.H. give him her
25 left hand. (Ex. 45, at 3:19 and 3:25.) When J.H. said she couldn't
26 do that out of concern about her eyeglasses, defendant warned that,
27 "You're gonna get sprayed again." (Ex. 45, at 3:28.) After nine
28 more seconds, defendant was then able to cuff J.H.'s left hand. (Ex.

45, at 3:37.) In contrast to other excessive-force cases, defendant did not use pepper spray after J.H. was cuffed or otherwise secured.

Based on these facts, the evidence does not establish by a preponderance of the evidence that defendant used pepper spray against J.H. with the intent (in whole or in part) to cause bodily injury to J.H. He used the pepper spray after verbal commands and physical control efforts failed. Consistent with that intent, he threatened to spray her again if she did not allow him to cuff her left hand. While placing J.H. in the back of a patrol car, defendant responded to J.H.'s continued protests by saying, "All you had to do was listen." When J.H. opined that defendant was "mad" because she was videoing him, defendant explained that, "No, I'm mad because you're not listening." Accordingly, the Government objects to PSR ¶ 50's finding that he did acted with that intent to cause bodily injury.⁴

⁴ Whether pepper spray constitutes a "dangerous weapon" has been the subject of litigation over the years. In United States v. Neill, 166 F.3d 943, 949 (9th Cir 1999), the Ninth Circuit concluded, in a bank robbery case, that the district court did not clearly err in determining that mace constituted a "dangerous weapon" because the victim suffered serious bodily injury when evidence proved pepper spray is capable of causing "extreme pain" and victim testified she felt like she was on "fire." However, Neill acknowledged that the issue of whether pepper spray constitutes a "dangerous weapon" has met "with mixed results" in other courts. Id. at 949 (citing United States v. Harris, 44 F.3d 1206, 1216 (3rd Cir. 1995) (overruling "dangerous weapon" enhancement in bank robbery case because the government failed to meet its burden of proving that the defendant "used an 'instrument capable of inflicting death or serious bodily injury'"); see also United States v. Perez, 519 Fed. Appx. 525, 528 (11th Cir. 2013) (overruling enhancement because the record did not show the pepper spray in question was "actually capable of inflicting a serious bodily injury"); United States v. Lancaster, 6 F.3d 208, 209-10 (4th Cir. 1993) (recognizing that district court, which determined momentary burning in eyes and cheeks from mace did not constitute significant injury, was in best position to assess facts, and did not clearly err in its determination).

(footnote cont'd on next page)

1 Second, the facts in this case do not establish by a
2 preponderance of the evidence that the offense involved "serious
3 bodily injury," and thus does not support a finding that the offense
4 qualifies under the second prong of the definition of "aggravated
5 assault." In contrast to the minimal showing needed to prove a
6 "bodily injury," "serious bodily injury" means an "injury involving
7 extreme physical pain or the protracted impairment of a function of a
8 bodily member, organ, or mental faculty; or requiring medical
9 intervention such as surgery, hospitalization, or physical
10 rehabilitation." See USSG § 1B1.1, Application Notes 1(B) and 1(M).

11 In this case, the testimony of treating physician Dr. Nicole
12 Wojtal, and other evidence indicated that J.H. sustained bruising
13 (i.e., contusions) and abrasions to her scalp, right wrist, and right
14 arm. (See generally CR 59 at 87-96; see also Ex. "A" hereto.) She
15 also had chemical conjunctivitis and contact dermatitis as a result
16 of the pepper spray to her face and head. Although these injuries
17 may have involved some pain and discomfort, they are temporary in

18
19 Since Neill, the Ninth Circuit has held that unnecessarily
20 spraying a person in the face with pepper spray can constitute
21 excessive-force, as well as allowing a handcuffed person to have the
22 spray on their face without promptly washing it off (as happened
23 here). See Headwaters Forest Defense v. County of Humboldt, 240 F.3d
24 1185, 1200 (9th Cir. 2001), vacated on other grounds, 122 S.Ct. 24
25 (2001). But after noting Neill's holding that "the use of pepper
26 spray by a defendant during the commission of a felony may constitute
27 use of a 'dangerous weapon,'" as defined in USSG § 1B1.1, cmt.
28 n.1(d), (j), the Headwaters court noted some misgivings about whether
that would be true in a police excessive-force case because:
"Admittedly, police use of pepper spray as a tactical tool to effect
arrest is distinguishable from its use by a felon during the
commission of a robbery." Id. See also See J. Cohen, Law
Enforcement Use of Less-than-Lethal Weapons: Considerations for
Congress (2025), <https://www.congress.gov/crs-product/R48365>
("[O]leoresin capsicum ("OC") spray ... generally does not require
medical attention for those sprayed." (citing A. Cordner and G.
Cordner, Overview of Law Enforcement Technology, Criminal Justice
Technology in the 21st Century, at 42 (3rd ed. 2017)).

1 nature and did not involve "extreme" pain or "protracted impairment"
2 of a bodily organ. As to the pepper spray, for example, when
3 Dr. Wojtal was asked if pepper spray is painful when applied to the
4 face, she testified blandly that, "Yes, it's uncomfortable." (CR 59
5 at 88, 93.) These injuries do not constitute serious bodily
6 injuries. Indeed, Dr. Wojtal's summary report notes that J.H.
7 complained only of "mild residual burning and pain of her face at the
8 site of the pepper spray." (See Ex. "A" hereto.)

9 There was also an allegation and evidence relating to a reported
10 "blunt head injury," but that remained vague and ill-defined even at
11 trial. The only evidence of any head injury was J.H.'s self-report
12 and a bruise/contusion observed on the scalp. (CR 59 at 87, 92.) It
13 is not clear where the bruise was located or, even after studying the
14 video evidence, how it occurred. According to the medical summary,
15 J.H. told medical staff that "she was involved in a use of force
16 during [which] she was pepper sprayed, pushed to the ground, hitting
17 her posterior head and right upper extremity." (Id. at 87; see also
18 Ex. "A" hereto.) The problem with this is that defendant's BWC video
19 does not show J.H.'s head hitting the ground when he forcibly threw
20 her to the ground (it was cushioned by landing on her left should and
21 upper arm), and she fell on her left side, not her right. (See Ex.
22 45, at 2:19.) The bruise reportedly observed on her scalp may have
23 been done to defendant pushing her against the ground after she was
24 already down or, perhaps, from the pepper spray that hit her in the
25 scalp on the back, right side of her head. (See Ex. 45, at 2:50.)
26 In any event, Dr. Wojtal's report says that J.H. had "no loss of
27 consciousness," and no CT scan was needed to assess the head injury.

1 (See Ex. "A"; CR 59 at 95.) Accordingly, whatever what may be said
2 of the injury, it does not constitute a "serious bodily injury."

3 Finally, there was evidence at trial that J.H. sustained an
4 injury to her wrist during her altercation with defendant. Oddly,
5 the Government did not allege a wrist injury in the indictment
6 (opting instead to vaguely allege "other physical injuries"), and we
7 hedged at trial when describing it in our opening statement only as a
8 "potential fracture of her wrist." (CR 58 at 12, lines 3-4.) On
9 direct exam, the Government also approached the injury in a gingerly
10 manner. (CR 59 at 89.) When asking about J.H.'s report of pain in
11 her right wrist (in an area called the "snuffbox"), the Government
12 asked Dr. Wojtal if "pain in the snuffbox area raise[s] any potential
13 concerns for you as a treating physician?" (CR 509 at 89.) Dr.
14 Wojtal said, "Yes, ... pain there can mean a fracture." (Id.)
15 Moreover. Dr. Wojtal testified that an x-ray of J.H.'s was negative
16 for any fracture, and that she splinted J.H.'s wrist per the standard
17 of care that counsel in favor of caution and assuming a potential
18 fracture actually occurred, and that is the treatment she would
19 provide for "everyone who complained of that kind of pain." (CR 59
20 at 89-90, 95-96.) Bottom line: The Government failed to prove an
21 actual fracture of J.H.'s scaphoid bone.

22 J.H. did report suffering pain in her right forearm and wrist,
23 but Dr. Wojtal's summary report notes that J.H.'s complaints as to
24 that injury "mild swelling and pain" with decreased range of motion.
25 (Ex. "A.") Dr. Wojtal also noted that J.H. had "no numbness or
26 tingling distal to the injury." (Id.) Overall, based on J.H.'s
27 report, Dr. Wojtal noted that "[p]ain is described as moderate in
28 nature." (Id.) Accordingly, based on the evidence at trial, the

1 injury to J.H.'s wrist and arm do not constitute "serious" bodily
2 injuries.

3 For all of the foregoing reasons, § 2A2.2's "aggravated assault"
4 guideline is inapplicable, and the Base Offense Level is 10 under
5 § 2H1.1(a)(3).

6 **C. The Obstruction of Justice Enhancement Is Improper**

7 In the indictment, the Government alleged that defendant
8 prepared and submitted a "misleading" supplemental police report that
9 contained "misleading[]" claims, but we eschewed use of the word
10 "false" when describing the falsity of those claims and never charged
11 defendant with a violation of 18 U.S.C. § 1591 (Falsification of
12 Records). (CR 1 at 3-4.) In a memo to the USPO, dated March 26,
13 2025, the Government alerted the USPO to those "misleading"
14 statements, but we advised that the Government was "not currently
15 planning to seek a two-level upward adjustment under USSG § 3C1.1 for
16 this misleading conduct." (USAO Memo at 6, n.3.)

17 In the PSR, the USPO determined that the statements made in
18 defendant's supplemental police report were materially false and
19 designed to obstruct the investigation of his own misconduct and any
20 prosecution. Based on those conclusions, the USPO applied a two-
21 level enhancement for obstruction of justice under USSG § 3C1.1.
22 (See PSR ¶¶ 58-60.) Based on our review of the video evidence, the
23 Government respectfully disagrees and objects to PSR ¶¶ 58-60.

24 First, defendant's report is not clearly false or misleading
25 when he says that J.H. attempted to hit him and that she turned and
26 took a "blading" or "fighting stance." The video recordings show
27 that as defendant approached her, J.H. brought her right hand out
28 from behind her back and swatted away defendant's left arm as he

1 reached out to grab her left hand, and J.H. stepped back in a
2 "bladed" stance. Oddly enough, both the indictment (CR 1, ¶ 8, at 2)
3 and PSR ¶ 21 both say that J.H. turned away from defendant at that
4 time. So, the PSR is internally inconsistent in saying defendant's
5 report on that point is false.

6 J.H. does not appear intent on striking a violent blow against
7 defendant, but it bears noting that a 911 caller reported that J.H.
8 was "assaulting" Winco store employees and "spitting in their faces";
9 the dispatcher's CAD texts said the suspects were "fighting Loss
10 Prevention" employees (Ex. 121); and Winco's interior surveillance
11 footage shows that J.H., in fact, assaulted a Winco store employee
12 minutes before, when she lowered her face mask and spat directly into
13 the employee's face from a few inches away.

14 In any event, here's what the video evidence shows of J.H.'s
15 conduct as defendant approached her:



Here, J.H. has her right arm down, standing square to defendant:



And then, J.H. raises her right arm, brings her left arm down and back, and steps back while turning to her left:



And, here's the swatting movement with her right arm:



1 And, these photos show the completed swatting movement, with a
2 full "blading" turn:



15 PSR ¶ 59 is also wrong in finding that defendant's report
16 falsely stated that he used his left foot/leg to sweep J.H.'s legs
17 while conducting a take-down. (See PSR ¶¶ 58-59.) It may not be a
18 classic move that they'll teach for decades at the Academy, but the
19 video shows defendant used his left leg to pin or block (or is it
20 "sweep"?) J.H.'s leg while forcing her to the ground. Again, let's
21 roll the tape And there it is:



1 Even if the statement about the use of his leg was a total
2 falsehood, it still would not warrant an obstruction-of-justice
3 enhancement because it was not "material" and did not "significantly
4 obstruct" the investigation or prosecution. See USSG § 3C1.1,
5 comment. n.4(G), n.6. The key fact, which defendant admitted in his
6 report, is that he threw J.H. to the ground.

7 And, finally, PSR ¶ 58 is wrong in finding that defendant made a
8 knowing and intentional false statement in his report when he wrote
9 that he attempted to spray J.H.'s eyes with the pepper spray, but she
10 turned her face away and thus required another burst of pepper spray
11 to hit her face. Contrary to PSR ¶ 59, the BWC video does not
12 clearly show that the first burst of pepper spray hit J.H. directly
13 in the face, as defendant intended. What the BWC video does clearly
14 show, however, is that J.H. turned her head away at some point, and
15 the first deployment of pepper spray hit her in the back and right
16 side of her head, as shown in these screenshots from Ex. 45, at 2:50.
17 As he admits, defendant then tried again and sprayed the pepper spray
18 more directly into J.H.'s face.



RESTITUTION

Upon the submission of sufficient evidence or a stipulation of the parties, the law authorizes the Court to order the payment of restitution for specified losses (e.g., an amount equal to the cost of necessary medical and related professional services relating to necessary physical, psychiatric, psychological, and rehabilitative care resulting from the offense and lost income resulting from the offense). See 18 U.S.C. § 3663A(b)(2). However, where the victim has received compensation from insurance or another source with respect to such losses, the restitution order should require defendant to pay the entities that provided or were obligated to provide such compensation. See 18 U.S.C. § 3664(j)(1).

As noted in the PSR, however, “[t]he Probation Officer and the AUSA have submitted requests for a victim impact statement and/or demand for restitution to J.H.’s legal counsel which have yet to yield any information.” (PSR ¶ 36; see also PSR ¶ 141.) Accordingly, the Government has no basis for recommending any amount of restitution at this time or to advise whether the payments should be made to J.H. or an insurer, employer, or other third-party payor.

CRIME VICTIMS’ RIGHTS ACT

The Government has advised J.H.’s attorney, Caree Harper, Esq., of the upcoming plea and sentencing hearing. Prior to entering the Post-Trial Agreement, the Government also contacted J.H.’s attorney to advise her of the terms of the contemplated agreement and heard and considered the attorney’s objections to it.

However, earlier today, a person who identified herself as J.H. called another AUSA, who was previously involved in this case. J.H. said that Ms. Harper has not been in contact with her, and J.H. was

1 seeking information about the case. The Government attorney told
2 J.H. about the upcoming hearing. J.H. said she wanted to speak with
3 a Victim/Witness person, and the Government's attorney provided her
4 with contact information for an FBI Supervisory Special Agent, who
5 could put her in touch with FBI's Victim/Witness Unit.

6 The Crime Victims' Rights Act affords victims the right to be
7 heard at any hearing involving a plea or sentencing of the defendant.
8 See 18 U.S.C. § 3771(a)(4). The Government does not yet know if J.H.
9 will be in attendance at the hearing. If she does attend the
10 hearing, J.H. has the right to personally address the Court regarding
11 both the plea and sentencing.

12
13 DATED: May 13 2025.

BILAL A. ESSAYLI
United States Attorney

14
15 /s/ R.J.K.

16 ROBERT J. KEENAN
Assistant United States Attorney

17 Attorneys for Plaintiff
18 UNITED STATES OF AMERICA
19
20
21
22
23
24
25
26
27
28

Exhibit “A”

J.H. Medical Record Excerpts

Diagnosis:

1:Blunt head injury; 2:Scalp contusion; 3:Contusion of right forearm; 4:Contusion of right wrist; 5:Chemical conjunctivitis; 6:Contact dermatitis; 7:Closed fracture of scaphoid of right wrist

Diagnosis/Assessment/Plan

1. Blunt head injury
2. Scalp contusion
3. Contusion of right forearm
4. Contusion of right wrist
5. Chemical conjunctivitis
6. Contact dermatitis
7. Closed fracture of scaphoid of right wrist

Contusion

A contusion is a deep bruise. Contusions are the result of a blunt injury to tissues and muscle fibers under the skin. The injury causes bleeding under the skin. The skin overlying the contusion may turn blue, purple, or yellow. Minor injuries will give you a painless contusion, but more severe injuries cause contusions that may stay painful and swollen for a few weeks.

Documentation

HPI: This is a 58-year-old female with a history of asthma, cancer and recent left eye reconstruction surgery presenting with an injury to the right wrist and forearm that occurred just prior to arrival. Patient was originally brought in by law enforcement as an ok to book but was released from custody prior to evaluation. Patient states she was involved in a use of force during which she was pepper sprayed, pushed to the ground hitting her posterior head and right upper extremity. There is no loss of consciousness. Does not take a blood thinner. Patient complains of mild swelling and pain of her right forearm and wrist with decrease range of motion secondary to pain. There is no numbness or tingling distal to the injury. Additionally, patient states she was pepper sprayed; face/eyes were cleaned with Sudecon wipes and patient complains of mild residual burning and pain of her face at the site of the pepper spray. There is no associated dental pain, back pain, neck pain, abdominal pain, visual disturbances. No recent illness
Pain is described as moderate in nature and are exacerbated by movement and palpation.

Exhibit “B”

EXHIBIT 5A - TRANSCRIPT OF DEFENDANT'S BWC VIDEO
(MODIFIED TO INCLUDE TIME-MARKS & KEY ACTIONS)

Defendant: Come here!

Mr. Barnes: It was something crazy!

Alejandro: What's going on?

Mr. Barnes: Look at the camera, bro. He come [unaudible] some shit, right.

Alejandro : Alright, relax!

Defendant: We're just going to pat you down, bud, big dog.

Mr. Barnes: I don't have nothin!

Alejandro: They said there's weapons.

Defendant: Okay, relax, we don't know that.

Mr. Barnes: Man, I don't have nothin' . . .

Alejandro: Okay we're just going to pat you down.

Mr. Barnes: . . . but a pack of cigarettes. See there goes this . . . Now what?

Defendant: Just relax!

Mr. Barnes: I'm not even being resistant!

Alejandro: That's the wife over there.

Mr. Barnes: Huh?

Defendant: Alright, dude . . .

Mr. Barnes: Wait, wait, wait, naw, man, I'm not, wait, wait, no, I'm not under arrest for what?

Defendant: You're not under arrest, you're being detained.

Alejandro: Detained.

Mr. Barnes: But why you... detained for what? For what!?

1
2 Alejandro: Dude, listen!

3
4 Defendant: Calm down!

5
6 Mr. Barnes: What have I done?

7
8 Defendant: Stop, dude.

9
10 Mr. Barnes: I haven't stole [inaudible] cake.

11
12 Defendant: Stop.

13
14 Mr. Barnes: Man, I can bust loose, man. Why y'all doin' this shit,
15 man? Boss, why y'all doin, all this?

16
17 Defendant: Dude, relax, or you're going to get put down.

18
19 Ms. Houseton: By law, you have to tell him the reason you detaining
20 him.

21
22 Mr. Barnes: That man was threatening me, man.

23
24 Ms. Houseton: By law, you have to . . . You see this? Yea, it's
25 on YouTube.

26
27 Mr. Barnes: Man, my wife's a paralegal. Ow! My arm is fucked up,
28 man!

29
30 Ms. Houseton: It's on YouTube Live.

31
32 Mr. Barnes: My arm is fucked up man!

33
34 Defendant: Where's the wife?

35
36 Alejandro: Over there.

37
38 Mr. Barnes: I'm telling you there's [inaudible] on my arm.

39
40 **[Defendant approaches and reaches out toward J.H.]**
41 **[Ex. 45, Time Stamp: 2:13.]**
42

43 Ms. Houseton: No! You can't touch me!

44
45 Defendant: Stop!

46
47 Ms. Houseton: You can't touch me!

1
2 Defendant: **Stop!**

3
4 **[J.H. forced to ground. Ex. 45, Time-Mark: 2:18.]**

5
6 Ms. Houseton: Ahhhhh!

7
8 **[Ex. 45, Time-Mark: 2:20.]**

9
10 Defendant: **Get down on the ground!** **[Time: 2:21]**

11
12 Ms. Houseton: What are you doing?

13
14 Defendant: **Get on the ground!** **[Time: 2:23]**

15
16 Ms. Houseton: It's already on YouTube Live.

17
18 Defendant: **Stop**, I don't give a . . . **Stop!** **[Time: 2:26]**

19
20 Ms. Houseton: Mother fucker, stop! Stop!

21
22 Defendant: **Stop or you're going to get punched in the face.** **[Time:**
23 **2:29]**

24
25 Ms. Houseton: You punch me and you gonna, you gonna get sued too!
26 You already got sued! I got you on camera!

27
28 Defendant: [Inaudible].

29
30 Mr. Barnes: She's got cancer, man!

31
32 Defendant: **Stop, turn around!** **[Time: 2:37]**

33
34 Ms. Houseton: I got it on camera. Get your neck off my, off my,
35 I can't breathe!

36
37 Defendant [to Dispatcher]: Hey, we're in a fight at the WinCo
38 **[Time: 2:41]**

39
40 Ms. Houseton: I can't breathe! There's no fight!

41
42 Defendant: **Stop!** **[Time: 2:43]**

43
44 Ms. Houseton: You threw me down to the ground! Stop man handling
45 me! I didn't do nothin'! **[Defendant Deploys Pepper Spray; Ex.**
46 **45, Time-Mark: 2:49.]** You threw me down! Call the commander!
47

1 Mr. Barnes: [Inaudible] . . . my sister!

2
3 Ms. Houseton: Call the commander!

4
5 Mr. Barnes: Come on, man!

6
7 Defendant: Hands behind your back! [Time: 2:57]

8
9 Ms. Houseton: Call the commander! Stop twisting my arm!

10
11 Defendant: Put your hands behind your back! [Time: 3:01]

12
13 Ms. Houseton: I can't!

14
15 Mr. Barnes: She got cancer, big bro! Man, don't do her like that,
16 man.

17
18 Ms. Houseton: Call the commander.

19
20 Alejandro: Calm down, man.

21
22 Mr. Barnes: Nah, I ain't doin' nothing.

23
24 Ms. Houseton: I'm requesting the commander.

25
26 Defendant: Stop! [Time: 3:11]

27
28 Ms. Houseton: I'm not doing anything! Call the commander! Call the
29 commander.

30
31 Defendant: Give me your hand. Give me your hand! [Time: 3:19]

32
33 Ms. Houseton: Call the commander. I got my prescription glasses.

34
35 Defendant: I don't care.

36
37 Ms. Houseton: I just got eye surgery.

38
39 Defendant: Put your hand behind your back! [Time: 3:25]

40
41 Ms. Houseton: Wait a minute! Let me get my . . .

42
43 Defendant: You're gonna get sprayed again. [Time: 3:28]

44
45 Ms. Houseton: . . . glasses out my hand.

46
47 Alejandro: You got her?

1
2 Mr. Barnes: Damn, man, baby, you alright?
3
4 Ms. Houseton: No.
5
6 Defendant: Let me get a 902r [inaudible].
7
8 Ms. Houseton: He threw me to the ground . . .
9
10 Mr. Barnes: Aye, bro, she got cancer, bro.
11
12 Ms. Houseton: He put his knee in my . . .
13
14 Defendant: Get up!
15
16 Ms. Houseton: I can't, I can't see anything. Why are you man
17 handling me?
18
19 Defendant: Because you're, you're being detained.
20
21 Ms. Houseton: No, I didn't do nothing. Now you're mad because I
22 put it on YouTube live. And they seen everything!
23
24 Defendant: Let's go!
25
26 Ms. Houseton: That's why you're mad.
27
28 Defendant: Let's go! Stop fighting!
29
30 Ms. Houseton: I'm not fighting! I can't see where I'm going!
31
32 Mr. Barnes: Jacy . . . just . . .
33

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of Orange County, California. I am over 18 years of age, and I am not a party to the above-entitled action. My business address is the United States Attorney's Office, Ronald Reagan Federal Building and United States Courthouse, 411 West Fourth Street, Suite 8000, Santa Ana, California 92701.

On this date, **May 13, 2025**, I served a copy of the attached document, **GOVERNMENT'S POSITION STATEMENT IN RESPONSE TO PRE-SENTENCE REPORT RE. DEFENDANT TREVOR JAMES KIRK**, on the defendant's attorneys of record and the assigned U.S. Probation Officer by e-mailing it to the following e-mail address:

Edward M. Robinson --- eroblaw@gmail.com
Brian A. Robinson --- broblaw11@gmail.com
Tom Yu --- TYu@TomYuLaw.com

Shani_Kochav@cacp.uscourts.gov

I declare under penalty of perjury that the foregoing is true and correct. This declaration is executed on this day, **May 13, 2025**, at Santa Ana, California.

/s/ R.J.K.
Robert J. Keenan